

MINUTES

RULES COMMITTEE MEETING

COMMISSION FOR MH/DD/SAS

Holiday Inn - Highwoods

**2805 Highwoods Boulevard
Raleigh, NC 27604**

Wednesday, October 13, 2004

Attending:

Commission/Committee Members: Floyd McCullouch, Chair, Anna Scheyett, Co-Chair, Lois Batten, Dorothy Crawford, Ann Forbes, Martha Martinat, Pender McElroy, Tom Ryba, Fredrica Stell, William Sims, Pearl Finch, George Jones, Emily Moore, Laura Coker

Ex-Officio Members: Sally Cameron, Bob Hedrick

Excused: Mazie Fleetwood, Martha Macon

Others: Don Willis, Cindy Kornegay, Judy Bright, Art Moore, John L. Crawford, Jerry Rice, Joe Glover, Marilyn Godette, Steve Lowery, Phil Medlin, Charles Franklin, Eldon Presnell, Craig Barnett, Rob Newman, Keljin Adams, Diane Pomper, Chris Aycock, Lena Klumper, Jacqueline Jeffers-Wright, Beth Hardy, John Owen, Mark Long, Martha Brock, Bob Carey, Nancy Carey, Christine Trottier, Cynthia Temoshenko, Mary Green-Edwards, Alec Myers, Jim Mayo, Sally Abril, Joe Cimbala

Handouts: Agenda; August 17, 2004 Minutes; Confidentiality Rules Proposed for Repeal; Dog Handler Proposed Rule Language; Resolution of Differences of Opinion Proposed Rule Language; 10A NCAC 27C .0102 and 10A NCAC 28A .0102 Definition of Physical Restraint; Children's Collaborative of Buncombe County; Non-Law Enforcement Dog Team Practice Standards; Advisory Opinion – Attorney General's Office Commission Rulemaking Authority Regarding Appeal Procedures for Non-Medicaid Clients

Welcome, Introductions and Approval of Minutes

Chair Floyd McCullouch called the meeting to order at 9:45 a.m.

A moment of silence was requested for our soldiers.

All members, staff and visitors made introductions.

A motion to approve the Minutes from the August 17, 2004 meeting was made. The motion passed.

Proposed Repeal of Two Confidentiality Rules

Cindy Kornegay gave an overview of the packet relating to the repeal of confidentiality rules 10A NCAC 26B .0207 Documentation of Release and 10A NCAC 26B .0303 Documentation of Disclosure. The 60-day comment period ended on 09/13/04 and no comments were received. The Division is requesting a favorable report from the Rules Committee to take to the full Commission on November 18, 2004 in order to receive final approval of the proposed repeals.

A question was raised concerning whether or not the consent for release form would be maintained in the client record. Division staff explained that federal HIPAA regulations require maintenance of authorizations/consents for release. It was noted there is no other explicit requirement in state confidentiality rules concerning maintenance of consents of release/disclosure. It was also noted that in the initial Commission discussions around this rule revision the Rules Committee had recommended that the rule be repealed only if there was another rule in existence to ensure that maintaining a copy of the consent for release/disclosure would be required.

A motion was made to recommend to the full Commission approval of the repeal of 10A NCAC 26B .0303 and amendment of 10A NCAC 26B .0207. The proposed amendment reads as follows; "Whenever confidential information is released with consent, a delegated employee shall ensure that the release is placed in the client record." The motion was passed.

Proposed Dog Handler Rules

Cindy Kornegay gave an overview of the packet relating to the proposed amendments and adoptions of rules governing drug detection dog handlers. It was explained that Session Law 2003-398 gave the Commission rulemaking authority relating to the acquisition, possession and security of controlled substances by persons registered under the provisions of G.S. 90-102.1. The proposed amendments to 10A NCAC 26E .0102; .0104; .0105; .0111 and .0113 were developed pursuant to the Commission's rulemaking authority. The legislation also authorized the Secretary to adopt rules relating to the training and qualifications for dog handlers and the certification of drug detection dogs. The proposed adoptions for 10A NCAC 26E .0106-.0107 were developed pursuant to the Secretary's rulemaking authority. It was also explained that in order to accommodate the adoption of these two rules the current Rules 10A NCAC 26E .0106 - .0127 would need to be recodified (renumbered).

Marilyn Godette presented information on the proposed revisions of 10A NCAC 26E .0102; .0104; .0105; .0111 and .0113 (Commission Rules). In addition, she presented information on the revisions to 10A NCAC 26E .0106 - .0107 (Secretary Rules) for the Committee's information. Ms. Godette's presentation on the rules compared the proposed revisions to the text published in the NC Register. The proposed revisions are based on technical changes, comments received from stakeholders and review of information on similar services provided in other states. There is difference of opinion between law enforcement and non-law enforcement stakeholders on the amount of training that should be required.

Division staff reviewed information concerning law enforcement and non-law enforcement drug detection services in other states and found wide differences in the requirements. Because of the differences found, the proposed changes focus on the standards for the canine certification associations and the demonstration of competency by the canine team.

The Division is requesting a favorable report from the Rules Committee to take to the full Commission on November 18, 2004 in order to receive final approval of the proposed Commission rules. The proposed Secretary's rules were presented for the Rules Committee's information and comments.

Chairperson McCulloch called for discussion/comment. Detective Eldon Presnell of the Greensboro Police Department recommended that the Secretary consider revising the proposed training and qualification requirements for dog handlers to include completion of a 10-week training program for each canine team. He also recommended inclusion of 24 hours of legal update training annually in the area of search and seizure. The recommendations were presented in response to concerns about 4th amendment rights and search and seizure issues. It was stated that concerns about these issues could lead to prosecutors being reluctant to file cases based on the findings of civilian dog handler teams. Detective Presnell also gave reference to several states whose law enforcement standards mandated more training than he was recommending. Examples included 360, 480, and 500 hours of training.

Joe Glover, National Drug Search LLC stated that he supports the proposed rules as currently written. Mr. Glover stated that his research indicated that there is a wide range of differences in the training requirements for law enforcement canine handlers in North Carolina. He indicated that law enforcement personnel to whom he had spoken stated this was often related to the size and budget of the police/sheriff department. He stated the General Assembly approved the legislation that created the registration category of non-law enforcement dog handlers with only 4 opposing votes.

There was discussion among Commission and ex-officio members. A question was raised concerning whether or not there is information available concerning outcomes (results of searches, prosecution) and the length of training required. Questions concerning the size, geographical location and type of law enforcement agency were also raised. Committee members were reminded that the proposed rules are applicable only to

non-law enforcement dog handlers. Information obtained by Division staff indicates wide differences in requirements in other states.

A motion was made to recommend to the full Commission approval of the proposed Commission rules. The motion further recommended that the comments and discussion from the speakers and Committee members be presented as feedback concerning the proposed training and qualification requirements to the Secretary. The motion was passed.

Don Willis stated that Division staff would gather further information to determine whether or not there is a basis for setting a minimum amount of training hours in addition to the proposed competency and certification requirements and if there have been problems in other states regarding the use of evidence obtained by non-law enforcement drug detection dog handler. The results will be shared at the November 18, 2004 Commission meeting.

Proposed Amendment of Resolution of Differences of Opinion Rule

Cindy Kornegay opened the afternoon session by presenting the proposed amendments of 10A NCAC 28F .0212 and 10A NCAC 27G .0212. 10A NCAC 28F .0212 is a Commission rule. The proposed amendment changes references of “area programs” to the statutorily correct “area authority/county program” and removes incorrect statutory reference and rule citations. 10A NCAC 27G .0212 is a Secretary rule. Corresponding amended language will need to be added to this rule in order to be consistent.

The Division is requesting a favorable report from the Rules Committee to the full Commission in order to publish the proposed amendments. Publication of the proposed rules in the NC Register initiates the 60-day comment period. A motion was made and passed to recommend approval to the full Commission.

Follow-up from August 17-18, 2004 Rule Committee/Commission Meeting

1. Interventions Requiring Additional Safeguards – Rule Applicable to State Operated Facilities

10A NCAC 28D .0208 Interventions Requiring Additional Safeguards

Per the request of the Rule Committee, Dr. Alec Myers and Dr. Jim Mayo representing Murdoch Center and Dorothea Dix Hospital respectively, presented information concerning the interventions listed in Paragraph (b) of this Rule. Examples of specific techniques and possible uses were described.

Pender McElroy asked that Commission members be sent a copy of the newly amended rule language which became effective on October 1, 2004 before the November Commission meeting.

Both Dr. Myers and Dr. Mayo concurred that the interventions listed in Subparagraphs (b)(4)–(7) are prohibited in facilities certified by CMS. Questions were raised concerning whether the interventions in Subparagraphs (b)(3)–(7) are being used anywhere in North Carolina. Don Willis reminded Committee members that this Rule is applicable only to state operated facilities. There is not a corresponding rule applicable to community facilities.

In response to Committee members' questions and concerns, Mr. Willis stated that information would be presented at the November Commission meeting concerning whether or not the interventions in Subparagraphs (b)(3)-(7) are used in any state operated facility. Information will also be presented to the Commission members showing a comparison of CMS requirements for Medicaid certified hospitals and ICF/MRs.

2. Definition of Physical Restraint

Dr. Mayo and Dr. Myers also presented follow-up information concerning the definition of physical restraint contained in the state facility rules. The information was presented in response to the Rule Committee/Commission's request for additional information at the August 17-18, 2004 meetings. Both stated that their respective facilities, Murdoch Center and Dorothea Dix Hospital follow the federal requirements and that a therapeutic hold used solely for the purpose of escorting a client who is walking is not considered an exclusion from the definition of physical restraint.

A motion was made that 10A NCAC 28A .0102 (32) be amended to delete the following words, "therapeutic holds use solely for the purpose of escorting a client who is walking" from the definition. There was discussion concerning whether or not it would be necessary to initiate the rulemaking process or whether the difference in the community rule and the state operated facility rule would be considered a typographical error that would not require rulemaking. The motion to amend the rule was withdrawn. Don Willis will contact the attorney general's office to get an opinion on the procedure to be followed and will report to the members at the November meeting.

Chairperson McCulloch asked if there were members of the public who would like to address the Committee concerning the definition of physical restraint. John Owen asked to be recognized. He reported on a personal experience with being physically restrained during a hospital stay. He stated that "walking restraints" should not be excluded from the definition. Mark Long also spoke to the Committee members. He stated we must be clear in the words we use and know the proper definition of the words. He also reflected on the many homes, centers and facilities that he personally has been in over the years and pleaded for justice and proper treatment.

New Business

Pender McElroy brought two letters to the attention of the Committee. The first one is an advisory opinion from the Attorney General's office regarding the authority of the

Commission for MH/DD/SAS to promulgate rules regarding appeal procedures for non-Medicaid clients. The advisory opinion concluded that the Commission does not have rulemaking authority concerning the subject matter and that it would require a statutory change by the General Assembly in order to create a statewide appeal system for non-Medicaid, non-committed persons concerning treatment decisions. Pender McElroy requested that this be an agenda item and that a representative from the Attorney General's office and Christine Trottier from Carolina Legal Assistance address the members at the November meeting.

The second is a letter from the Children's Collaborative of Buncombe County regarding the recent child fatality. Jerry Rice of Buncombe County spoke regarding the letter from the Children's Collaborative. He stressed the need for service providers to have clear guidance in order that situations such as this do not arise. He stated that in the coming years, there may be more deaths in group homes if excellent service is not provided. He also suggested that findings concerning agency inspections should be published on the Internet so that families could have more knowledge about facilities before agreeing to a placement.

The meeting adjourned at 3:50 p.m.